

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35697

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 616
	)	
Plaintiff-Respondent,	)	Filed: September 18, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
MICHAEL SHANE BYINGTON,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order denying motion for new trial, affirmed.

Idaho Law Group, LLP, Nampa, for appellant. Ron McWilliams argued.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent. Nicole L. Schafer argued.

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LANSING, Chief Judge

Michael Shane Byington was convicted by jury of aggravated assault. He appeals from the district court's denial of his subsequent motion for a new trial brought on the ground of newly discovered evidence. We affirm.

I.

FACTS AND PROCEDURE

On New Year's Eve 2007, there was a party held at a residence shared by Byington, his girlfriend, Crystal Lundberg, and Lundberg's daughter, C.L. At the party Lundberg got into a physical fight with Byington's niece. Lundberg and C.L. left the residence and stayed elsewhere that night. Lundberg apparently was upset with Byington for not intervening in the fight and the next day she and C.L. went back to pack up their possessions. Corey Richardson, C.L.'s cousin, learned of the altercation and that Lundberg and C.L. were at the Byington residence and went to the home to retrieve C.L. from a place and situation he considered not safe. Byington let Richardson into the residence and words were exchanged between the men in the immediate

presence of Lundgren and C.L. At some point, Byington grabbed a shotgun, either pointed it at or displayed it to Richardson, and told him to get out of the house. Richardson and C.L. left and Richardson called the police. Both Richardson and C.L. filled out written police statements. Richardson's statement said that during the confrontation Byington became angry and pointed the shotgun at him. C.L.'s statement said that Byington "pointed a gun at my cousin Cory Richardson only because he asked what happened last night and Mike said a fight said [sic] get out of my house while pointing the gun at my cousin Cory."

Byington was charged with aggravated assault by use of a deadly weapon. Idaho Code §§ 18-901, -905(a). At trial he contended that he acted in justifiable self-defense out of fear of physical assault by Richardson. Lundgren testified in Byington's defense but C.L., although she attended the trial and was listed as a defense witness, did not. The jury returned a verdict of guilty.

Byington hired a new attorney and filed a motion for a new trial based upon newly discovered evidence. His evidence consisted of C.L.'s affidavit in which she stated that during the confrontation Richardson was angry, yelling and throwing his hands about while stepping back and forth towards Byington, that Byington did not point the gun at Richardson but only held it to his chest, that she felt pressured and intimidated by Richardson and her father's family to back up Richardson's statement to the contrary, and that she did not tell Byington's trial attorneys about these things. At the hearing on Byington's motion for a new trial, however, C.L. testified differently from her affidavit on one point, stating that she told Byington's trial attorneys that, contrary to her police statement, Byington did not point the gun at Richardson. Her testimony is ambiguous as to whether she gave this information to the attorneys before or after Byington's trial. The district court denied the motion for a new trial on multiple grounds. Byington appeals.

## **II. ANALYSIS**

Byington contends that the district court erred in denying his motion for a new trial based upon newly discovered evidence. The standards are well settled. A trial court may grant a new trial, on the defendant's motion, in the interest of justice. Idaho Criminal Rule 34. Idaho Code § 19-2406 specifies the permissible grounds for a new trial and authorizes a new trial when the defendant shows that there exists new evidence material to the defense that could not have been produced at the trial with reasonable diligence. I.C. § 19-2406(7). Newly discovered evidence

warrants a new trial only if the defendant demonstrates: (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) failure to learn of the evidence was not due to a lack of diligence on the part of the defendant. *State v. Stevens*, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008); *State v. Drapeau*, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976); *State v. Hayes*, 144 Idaho 574, 577, 165 P.3d 288, 291 (Ct. App. 2007). The denial of a motion for new trial is reviewed for an abuse of discretion. *Stevens*, 146 Idaho at 144, 191 P.3d at 222; *Hayes*, 144 Idaho at 577, 165 P.3d at 291. A motion for a new trial based on newly discovered evidence involves questions of both fact and law. An abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law. *Stevens*, 146 Idaho at 144, 191 P.3d at 222; *Hayes*, 144 Idaho at 577, 165 P.3d at 291. Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and conservation of scarce judicial resources. *Stevens*, 146 Idaho at 144, 191 P.3d at 222; *Hayes*, 144 Idaho at 577, 165 P.3d at 291.

In denying the motion, the district court held that Byington had failed to establish any of the four *Drapeau* factors necessary to merit a new trial on the basis of newly discovered evidence. In deciding this appeal, we need address only one. The district court held that Byington had failed to present any evidence that the failure to learn of the evidence was not due to a lack of diligence on his part. The record bears this out. Neither Byington nor his trial attorneys testified or presented affidavits in support of the motion. C.L. did not testify about what she was *asked* by Byington or his trial attorneys; instead her testimony and affidavit focused on what she did and did not *tell* them. Byington presented no evidence that either he or his attorneys asked C.L. any questions about any of her observations of the confrontation or about anything else, and C.L.'s testimony at the hearing can be interpreted to mean that she told Byington's defense attorney at or before the trial the key information that Byington now claims to be newly discovered. Accordingly, Byington did not establish that he could not have discovered the matters presented in C.L.'s affidavit and testimony by the exercise of diligence prior to his trial.

The district court's order denying the motion for a new trial is affirmed.

Judge GUTIERREZ and Judge GRATTON CONCUR.